

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

* * * * * C.R. NO. 17-004-JJM
UNITED STATES OF AMERICA
VS. NOVEMBER 13, 2018
JAY GACCIONE 3:00 P.M.
* * * * * PROVIDENCE, RI

BEFORE THE HONORABLE JOHN J. McCONNELL, JR.,
DISTRICT JUDGE

(Change of Plea Hearing)

E X C E R P T

APPEARANCES:

FOR THE GOVERNMENT: DENISE M. BARTON, AUSA
U.S. Attorney's Office
50 Kennedy Plaza
Providence, RI 02903

FOR THE DEFENDANT: KEVIN J. FITZGERALD, ESQ.
Federal Defender's Office
10 Weybosset Street
Providence, RI 02903

Court Reporter: Karen M. Wischnowsky, RPR-RMR-CRR
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1 **BEGINNING OF EXCERPT**

2 13 NOVEMBER 2018 -- 3:00 P.M.

3 MS. BARTON: Your Honor, as to Counts I, II,
4 III, V and VI, the charges of 18 U.S.C. 2251(a), sexual
5 exploitation of a minor, the four elements of that
6 offense are, first, that the Defendant employed, used,
7 persuaded, induced, enticed or coerced a minor victim
8 to engage in sexually explicit conduct; second, at the
9 time the minor victim or the victim was under the age
10 of 18; third, the Defendant acted with a purpose of
11 producing a visual depiction of such conduct; and
12 fourth, the visual depiction was produced or
13 transmitted using materials that have been mailed,
14 shipped or transported in or affecting interstate or
15 foreign commerce by any means, including computer.

16 The term "sexually explicit conduct" includes
17 the following actual or simulated acts: Sexual
18 intercourse, including oral-genital, masturbation or
19 lascivious exhibition of the genitals or pubic area of
20 any person.

21 As to Counts I through III and V, which are four
22 of the five sexual exploitation of a minor counts to
23 which the Defendant is pleading, the United States
24 would present evidence that the Defendant, Jay
25 Gaccione, caused Minor Victim Number 1, who is his

1 daughter, to engage in sexually explicit conduct,
2 specifically the lascivious exhibition of her genitals
3 or pubic area, and that he photographed it on four
4 different dates: April 16th, 2014; May 10th, 2014;
5 July 21, 2014; and October 13th, 2015.

6 The evidence would also show that Minor Victim
7 Number 1 was between the ages of 12 and 14 years old on
8 these dates.

9 Specifically, and in summary, your Honor, as to
10 Count I, on or about April 16th, 2014, the Defendant
11 took photographs of Minor Victim 1 in various stages of
12 undress. One of those images depicts a close-up image
13 of her vagina, and the other depicts a close-up image
14 of her anus and vagina.

15 As to Count II, on or about May 10th, 2014, the
16 Defendant took three sexually explicit images of Minor
17 Victim Number 1. One image shows her pulling her pants
18 down and showing her vaginal area, and two images show
19 her touching and inserting her fingers in her vagina.

20 As to Count III, on or about July 21, 2014, the
21 Defendant took a photograph of Minor Victim Number 1 in
22 which she is pulling her underpants aside and exposing
23 her vagina.

24 As to Count V, on or about October 13th, 2015,
25 the Defendant took photographs of Minor Victim Number 1

1 again in various stages of undress. In one of those
2 images, she is standing up, pulling her pants down and
3 exposing her vagina.

4 As to Count VI, the last sexual exploitation of
5 a minor count to which the Defendant is pleading, the
6 United States would present evidence that on or about
7 April 24th, 2016, when his daughter was 14 years old,
8 the Defendant, Jay Gaccione, caused her to engage in
9 sexually explicit conduct and photographed and videoed
10 it.

11 Specifically, on that date he photographed her
12 orally copulating him, and he videoed the lascivious
13 exhibition of her anus and vagina; and during the
14 filming, he directed her to masturbate.

15 The images and video described previously were
16 produced on materials that had been mailed, shipped or
17 transported in or affecting interstate or foreign
18 commerce. Specifically, the micro SD card containing
19 the images alleged in Counts I through III and the
20 other micro SD card containing the images alleged in
21 Count V -- the images and video alleged in Counts V and
22 VI were both produced in China.

23 Would your Honor like me to continue with the
24 other count?

25 As to Count VII, your Honor, charging

1 distribution of child pornography in violation of
2 18 U.S.C. 2252(a)(2), the first element of that offense
3 is that the Defendant knowingly distributed a visual
4 depiction; second, the Defendant knew the visual
5 depiction was of or showed a minor engaging in sexually
6 explicit conduct; and three, the visual depiction was
7 shipped or transported using any means or facility of
8 interstate or foreign commerce or was shipped or
9 transported in or affecting interstate or foreign
10 commerce or contains materials which have been so
11 shipped, including by computer.

12 As to Count VII, the United States would produce
13 evidence that on or about April 29th, 2016, the
14 Defendant was communicating via Gmail and Sprint
15 messaging service with an individual who was in South
16 Africa.

17 On that date, that individual in South Africa
18 told the Defendant that he had images of his three- and
19 five-year-old children and would trade for like value;
20 and after sending those images to the Defendant, they
21 discussed sexual aspects of the images sent to the
22 Defendant.

23 Thereafter, the Defendant told that individual
24 that he had images of his 15-year-old daughter, who was
25 actually 14, and he sent six images to that individual

1 in South Africa.

2 Counts XIII and IX allege violation of Title 18
3 United States Code 2252(a)(4)(B), possession of child
4 pornography. The first of four elements of that
5 offense are that the Defendant knowingly possessed any
6 computer, computer storage medium or matter which the
7 Defendant knew contained a visual depiction of a minor
8 engaged in sexually explicit conduct; second, the
9 Defendant knew the visual depiction contained in the
10 storage medium was of or showed a minor engaged in
11 sexually explicit conduct; third, the Defendant knew
12 that the production of the visual depiction involved
13 the use of a minor engaged in sexually explicit
14 conduct; and fourth, the child pornography had been
15 mailed, shipped or transported using any means or
16 facility of interstate or foreign commerce or in or
17 affecting interstate or foreign commerce, including by
18 computer, or was produced using materials which had
19 been so mailed or so shipped.

20 As to Counts XIII and IX, the United States
21 would present evidence that the Defendant knowingly
22 possessed visual depictions of images and a video of a
23 person he knew to be a minor, his daughter, engaged in
24 sexually explicit conduct, including the images
25 described previously, and that those images were

1 produced using materials that had been mailed or
2 shipped or transported in interstate or foreign
3 commerce, specifically SD cards that had been
4 manufactured in and shipped from China.

5 Count VIII involves possession from a date not
6 later than April 16th, 2014, through November 4th,
7 2016, on an SD card, serial number ending XDAP.

8 Count IX involves possession from a date not
9 later than October 25th, 2015, and continuing through
10 November 4th, 2016, on an SD card with a serial
11 number -- sorry. I apologize, your Honor.

12 As to Count VIII, the serial number actually
13 ended CABE. The serial card, SD card for Count IX ends
14 in XDAP. And that's it, your Honor.

15 THE COURT: Thanks, Ms. Barton.

16 Mr. Gaccione, you heard the elements of the
17 eight counts that the Government has brought against
18 you. I'd again remind you they'd have to prove each
19 and every one of those elements beyond a reasonable
20 doubt for you to be found guilty of any or all of those
21 counts.

22 You also heard the facts the Government would
23 prove if this case were to go to trial. Do you admit
24 the facts as stated by the Government as true?

25 THE DEFENDANT: Yes.

1 THE COURT: Before I ask you about your change
2 of plea, Mr. Gaccione, do you have any questions for
3 the Court or do you want to confer with your attorney
4 about any matter?

5 THE DEFENDANT: Just one thing.

6 THE COURT: Sure.

7 (Defendant confers with counsel)

8 THE DEFENDANT: I just wanted to say one thing.
9 She said that I sent pictures of my daughter to someone
10 in Africa or something like that. I never sent any
11 pictures of her. It was pictures of, you know, other
12 kids off the internet.

13 THE COURT: I don't think, Ms. Barton, that that
14 change in facts would affect the elements of Count VII,
15 which is what Mr. Gaccione's referring to. Is that
16 correct?

17 MS. BARTON: Could I have a moment, your Honor?

18 THE COURT: Sure.

19 (Pause)

20 MS. BARTON: Your Honor, I think the charge
21 alleges that it was sent I believe on or about
22 April 29th. What the evidence showed, in part
23 because of Mr. Gaccione's Mirandized interview, was
24 that Mr. Gaccione was communicating with members of
25 a -- I'm giving you the explanation because I think the

1 answer to your question is yes, I think it does matter,
2 and this is why.

3 Mr. Gaccione was communicating with members of
4 an online bulletin board, for lack of a better
5 description, of child pornographers who would upload
6 images and exchange images.

7 Mr. Gaccione admitted when he was interviewed by
8 agents that he had uploaded some images or shared
9 images. I don't know if it was an upload or share; but
10 in any event, he shared images and represented to the
11 community that these were images of his children.

12 And the members of the community effectively
13 called him out and called him on his BS; and they said
14 no, these are known images. Like, we know these aren't
15 your kids.

16 So what Mr. Gaccione admitted when he was
17 interviewed by agents on the day of his arrest was that
18 he began taking pictures of his daughter to share with
19 members of the bulletin board, that he took pictures of
20 her chest and vagina, and he said that he sent them to
21 another individual.

22 We have the communications going back and forth
23 between him and this South African individual, Mr. Kahn
24 Burn, who was picked up as part of a Homeland Security
25 investigation in Pretoria, where we have six images

1 that were sent by Mr. Gaccione to Mr. Burn on that
2 date, and it was after he had represented that he was
3 sending images of his daughter.

4 So those are the images that we are charging.
5 There were other images that Mr. Gaccione, and I
6 believe those are the images that he's referring to,
7 did, in fact, send to other members of the community
8 that were random, for lack of a better word, images of
9 child pornography not involving his child.

10 So as charged, we're referring to six -- was it
11 six or three? Six images that were sent on April 29th.

12 THE COURT: Right, but --

13 MS. BARTON: I don't know the date of the other
14 upload. It could have been April 29th. It could have
15 been April 30th. I suppose, your Honor, the "on or
16 about" might give some flexibility --

17 THE COURT: But also if Mr. Gaccione is willing
18 to admit that on April 29th he distributed via the
19 internet photographs of a minor that meet the elements
20 of child pornography, I don't have them handy here, but
21 meet those elements, for purposes of change of plea,
22 the identity of the minor is irrelevant, isn't it?

23 MS. BARTON: I think it could be for this, your
24 Honor. I do, however, just want to relay to
25 Mr. Gaccione and to the Court that I do think this

1 calls into question whether or not there would be
2 acceptance of responsibility when the guidelines are
3 calculated because this goes directly opposite to
4 something that Mr. Gaccione said in a recorded
5 interview.

6 THE COURT: Let me hear from Mr. Fitzgerald.

7 MS. BARTON: So I do think that is an issue.

8 MR. FITZGERALD: Well, the identity of the
9 person in the picture is not an element of the charge,
10 your Honor. That's something we can handle. I think
11 you can take the plea based on what he's admitted to
12 today.

13 As far as whether or not the Government thinks
14 he's accepting responsibility, that's up to the Court
15 at sentencing. And, unfortunately, the guideline range
16 is going to be so high that I'm not sure that makes
17 much of a difference, but if the Government -- I
18 certainly could talk to Ms. Barrett after today and --

19 THE COURT: Barton.

20 MR. FITZGERALD: Excuse me?

21 THE COURT: Barton.

22 MR. FITZGERALD: Barton. I'm sorry. After
23 today and perhaps clear this up.

24 THE COURT: I actually think that this issue can
25 be postponed until the time of sentencing because, as I

1 did my little checklist as you were reading the facts
2 and from what I understand Mr. Gaccione is willing to
3 admit to, that he is willing to admit to all of the
4 facts sufficient to meet each and every one of the
5 elements of the charge even though he's now disputing
6 the identity of the child in the photographs on
7 April 29th. So I think we can leave that part for
8 another date.

9 MS. BARTON: Okay.

10 THE COURT: So why don't you both have a seat.

11 Mr. Gaccione, let me ask you this if you can
12 follow it. As you have amended the facts that
13 Ms. Barton stated, as you have amended the facts as she
14 stated, do you admit to those facts as Ms. Barton
15 stated as you've amended?

16 THE DEFENDANT: Yes.

17 THE COURT: And let me ask you one more time, do
18 you -- are there any other matters that you want to
19 discuss with your attorney?

20 THE DEFENDANT: No. I'm okay.

21 THE COURT: Or have any questions for the Court?

22 THE DEFENDANT: All set.

23 THE COURT: Okay. How do you now plead to the
24 eight counts, Counts I, II, III, V, VI, VII, VIII and
25 IX, contained in the Indictment, guilty or not guilty?

1 THE DEFENDANT: Guilty.

2 THE COURT: This Court has heard from the
3 Government the evidence it would present if this matter
4 were to go to trial. The Court has questioned the
5 Defendant regarding his understanding of the nature of
6 these proceedings and the consequences of entering a
7 plea of guilty to the charge.

8 It is, therefore, the finding of this Court in
9 the case of the United States versus Jay Gaccione that
10 the Defendant is capable -- fully capable and competent
11 to enter an informed plea, that the Defendant is aware
12 of the nature of the proceedings and the consequences
13 of the plea and that the plea of guilty is a knowing
14 and voluntary plea supported by an independent basis in
15 fact containing each of the essential elements of each
16 of the charges; and, therefore, the plea is accepted,
17 and the Defendant is now adjudged guilty of those
18 offenses.

19 Sentencing will be set down for February 20th,
20 2019, at 11 a.m.

21 Ms. Barton, anything further for the Government?

22 MS. BARTON: Nothing, your Honor.

23 THE COURT: Mr. Fitzgerald, anything further for
24 Mr. Gaccione?

25 MR. FITZGERALD: Nothing today, your Honor.

1 Thank you.

2 THE COURT: Great. Thanks. We'll stand
3 adjourned, folks.

4 THE DEFENDANT: Thank you.

5 (Adjourned)

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7 * * * * *

8 C E R T I F I C A T I O N

9
10
11 I, Karen M. Wischnowsky, RPR-RMR-CRR, do
12 hereby certify that the foregoing pages are a true and
13 accurate transcription of my stenographic notes in the
14 above-entitled case.

15
16 December 12, 2018

17 Date

18
19
20 /s/ Karen M. Wischnowsky

21 Karen M. Wischnowsky, RPR-RMR-CRR
22 Federal Official Court Reporter
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